80-512

Supreme Court, U. S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALTIMORE COUNTY, MARYLAND,
Petitioner,

v.

RAYMOND INTERNATIONAL BUILDERS, INC.,
and
J. E. GREINER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Baltimore County, Maryland, the Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Special Appeals of Maryland entered in the above-entitlted case on April 11, 1980, and the order dated July 3, 1980, of the Court of Appeals of Maryland which denied a Petition for Writ of Certiorari relating to said case.

QUESTIONS PRESENTED

1. Was the Court of Special Appeals correct when it held that, following *Hollerbach v. United States*, 233 U.S. 165 (1914), Baltimore County was liable to a contractor for cost overruns on a bridge repair contract, where the contractor allegedly relied on data provided by the county, even though the contractor was warned the data was forty years old and should not be relied upon?

2. Was the Court of Special Appeals correct when it remanded the case to the trial court for damages alone, and against the Petitioner alone, when the Respondent, J. E. Greiner, Inc., was also an original Defendant and had prepared the contract documents upon which the allegations of misrepresentations had been made?

3. Did the failure on the part of the State Court to apply your Petitioner's defenses of sovereign immunity and the statute of limitations deprive your Petitioner of its rights of due process under the Constitution of the United States?

PARTIES

The Petitioner herein, Baltimore County, Maryland, was a Defendant before the Trial Court, and was an Appellee before

the Court of Special Appeals of Maryland. The Respondent herein, Raymond International Builders, Inc., was the Plaintiff before the Trial Court, and was the Appellant before the Court of Special Appeals. The Respondent herein, J. E. Greiner, Inc., was a Defendant before the Trial Court in the action brought by Raymond International Builders, Inc., and was a Cross-Defendant in the Trial Court proceedings in a Cross-Claim filed against such party by Baltimore County, Maryland, before the Trial Court.

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IN THE

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BALTIMORE COUNTY, MARYLAND,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland whose judgment is herein sought to be reviewed is reported at 412 A.2d 1296. By its order dated July 3, 1980, the Court of Appeals of Maryland denied Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257, as the Petitioner herein is alleging that its rights and privileges under the Fourteenth Amendment to the Constitution have been violated by the State Court decision. Additionally, the principal issue in the case relates to the State Court construction and application under the Supreme Court of the United States case of *Hollerbach v. United States*, 233 U. S. 165 (1914), and your Petitioner is alleging that the State Court erroneously construed and applied such 1914 case and overlooked a more recent Supreme Court and other federal decisions relating to the issue in *Hollerbach*. Under Rule 19 of the Rules of the Supreme Court, the Supreme Court may consider the application of the decisions of the Supreme Court in order to clarify in a uniform way such application. Additionally, under Rule 20 of the Rules of the Supreme Court, the Supreme Court may give consideration to the imperative public importance of the matter, and the Petitioner is alleging that the application by the State Court in the case at bar could detrimentally affect municipal and state contracts throughout the United States contrary to the public interest and not in accordance with the current view of the Supreme Court of the United States.

Although the element of damages in this case was remanded to the trial court for further consideration as to the Respondent, Raymond International Builders, Inc., the case was fully and finally determined as to the Respondent, J. E. Greiner, Inc. Additionally, the case was fully and finally determined as to the defenses of sovereign immunity and statute of limitations raised by the Petitioner.

Therefore, it is the Petitioner's belief that this case is in a posture of finality for review by this Honorable Court with reference to some or all of the issues.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 25A, Section 1A of the Annotated Code of Maryland

> "Article 25A—Chartered Counties of Maryland 1A.
>
> (A) Unless otherwise specifically provided by the laws of Maryland, a chartered county, and every officer, department, agency, board, commission or other unit of county government may not raise the defense of sovereign immunity in the courts of this state in an action in contract based upon a written contract executed on behalf of the county, or its department, agency, board commission, or unit by an official or employee acting within the scope of his authority. . . .
>
> SECTION 7. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1976.
>
> Approved May 4, 1976."

STATEMENT OF THE CASE

On July 17, 1972, the Respondent, Raymond International, Inc. (hereinafter referred to as "Raymond") and Petitioner, Baltimore County, Maryland, entered into a written contract relating to underwater repairs to the Wise Avenue Bridge in Baltimore County. The bridge was in excess of forty years old.

The contract documents in this case were made up of various documents which included an invitation to bid, specifications, proposal, agreement, special provisions and various documents. Section 5 of the Special Provisions states:

> "Original construction data has not been verified by actual field measurements and the conditions observed during the underwater inspections and tests may have changed since the date on which furnished to the contractor for general information purposes only and do not purport to represent existing field conditions. It shall be the contractor's sole responsibility to verify by actual field measurements, inspections and tests and data which may be of significance to him in the preparation of his bid."

The contract document specifically states that "Special Provisions shall govern over specifications, supplemental specifications and plans." In addition the invitation to bid states at page 1-03 that:

> "Bidders must examine the drawings and specifications carefully and must make a personal examination of the location and nature of the proposed work."

Sheet "X" of the contract documents states in the notes:

> "Note 2–contractor to verify all dimensions in field. Note 5–dimensions shown taken from as built plans and have not been verified by actual measurement. The contractor shall verify any and all dimensions as may be required to complete satisfactorily all work under this contract."

The Proposal, which is a part of the contract, clearly states that:

> "The undersigned hereby declare that they have carefully examined the Form of Contract Specifications, Special Provisions and Drawings forming a part of the same and have their satisfaction examined the locality of the proposed work. . . ."

Substantial testimony was produced at trial showing that Raymond could have determined the underwater conditions, prior to its submitting its bid for the repair job, through the use of soundings, observations and underwater probes. Raymond should have foreseen the underwater conditions which existed because of the age of the bridge (over forty years old) and the repeated statements in the plans and specifications that the drawings and measurements were original construction data and had not been verified. The contract had clear and unambiguous statements to the effect that the data was old, was given for general information purposes only and did not purport to represent existing field conditions. In addition the contract stated that it was Raymond's responsibility to verify any data which might be of significance in the preparation of its bid.

The original contract price for the repair job was $213,000. Immediately after the contract was awarded to them, Raymond decided that it did not have enough profit in the job and attempted to persuade the county to change the plans and specifications in order to create more profit. After repairs

began, Raymond alleges that it discovered that specifications provided by the county were inaccurate. The testimony also revealed that in September of 1972, Raymond was fully aware of the underwater conditions, and could have taken any legal action it sought fit to rescind the contract, or other legal measures that might have been designed to protect any legal interest it might have had in this matter. However, Raymond took no such action.

Notwithstanding the fact that Raymond took no action in September of 1972 or soon thereafter, it later alleged that it had to perform unforeseeable work at an increase in cost in excess of one million dollars. Raymond did not institute any action against Baltimore County until May 26, 1976; more, the documents clearly stated that the bidder should not rely on the information given in preparing its bid.

Respondent then instituted an appeal in the Court of Special Appeals of Maryland. Relying heavily on this Court's holding in *Hollerbach v. United States*, 233 U. S. 165 (1914), the Court of Special Appeals held that the Trial Court had erred in holding that the Raymond was not justified in relying upon the data provided. The Court of Special Appeals further held that Raymond was entitled to compensation for the unforeseen or negligently misrepresented conditions which they encountered in the performance of the contract. However, the Court of Special Appeals determined that the Respondent, J. E. Greiner, Inc., the independent contractor who prepared the specifications for the bid, was not responsible in any way despite the fact that the proceedings contained a cross-claim brought by your Petitioner against said Greiner. The Court of Appeals of Maryland denied, without opinion, Baltimore County's Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because there is an urgent need for clarification and guidance from the Supreme Court as to when municipal corporations and states will be held liable for the accuracy of information provided to prospective bidders and when exculpatory clauses will be upheld.

In *Hollerbach v. United States*, 233 U. S. 165 (1914), the Court held that where the government has made a positive representation upon which the contractor has justifiably relied, the government will be held liable for increased costs if the representations prove to be inaccurate. In *MacArthur Brothers Co. v. United States*, 258 U. S. 6 (1922), the Court held that where there has been no positive assertion there can be no liability.

> "To hold the government liable under such circumstances would make it an insurer of the uniformity of all work, and cast upon it responsibility for all of the conditions which a contractor might encounter, and make the cost of its projects always an unknown quantity." *Id.* at 13.

There is a need for the Supreme Court to provide guidance for the gray area between *Hollerbach* and *MacArthur*. In the sixty-six years since the Court handed down its decision in *Hollerbach*, the Courts have differed widely in applying it. There is great confusion in the federal and state courts as to when there has been a positive assertion upon which the contractor is justified in relying. Some courts have even used *Hollerbach* to hold the government absolutely liable for information provided to contractor, even where the contractor has clearly been warned that the data may be inaccurate and should not be relied upon. *Raymond International, Inc. v. Baltimore County* is a good example of such an erroneous application of

Hollerbach. Raymond was clearly warned that the information provided to it was from original construction drawings, which were more than forty years old, and that data should not be relied upon unless the contractor verified it for itself. The Court of Special Appeals of Maryland held that following *Hollerbach* the Court was liable when the information allegedly proved to be inaccurate. The Court of Special Appeals of Maryland and other courts have effectively interpreted *Hollerbach* as holding governments absolutely liable for information provided to contractors. Clearly the Court did not intend this to be the effect of its decisions in *Hollerbach* and *MacArthur*.

The confusion existing in the federal and state courts can be clearly seen by examining cases where the fact situations were similar but the court's decisions were vastly different. In *Archie and Allen Spiers, Inc. v. United States*, 296 F.2d 757 (Court of Claims, 1961), the court was faced with a situation similar to that in *Raymond International*. The Navy had requested bids on a contract to refurbish and repair its pipelines on several piers. The proposal contained a clause telling bidders to

> "inspect carefully the work in place and satisfy themselves as to the character and amount of work to be removed, re ewed, or replaced. . . ."

The contract drawings contained statements that the "contractor shall verify all dimensions and conditions at the site." The contractor failed to verify the data on the drawings before submitting his bid. The data was inaccurate and the contractor brought suit for the cost overruns which resulted. The court held that the government was not liable for the overruns. The court recognized *Hollerbach* but held that it did not remove all cautioning and exculpatory clauses from contracts. The contractor was not justified in relying upon the data supplied by the government.

In *Elkan v. Sebastian Bridge District*, 291 F. 532 (8th Cir., 1923), the court held that the government was not liable where representations made in construction plans were inaccurate. The construction plans for a bridge contained a profile of test borings from the bridge site. The contract contained a clause stating that:

> "data furnished to bidders. . .are to be considered as approximate and bidders must assume the risk of having to carry the foundations to a greater or less depth without altering their prices."

The contractor used the government's data to determine how much work was required. When the foundations had to be dug deeper, he filed suit to recover his cost overruns. The court held that *Hollerbach* did not require the government to be held liable under these circumstances.

In *Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957 (N.D.Ga. 1976), the court stated that if a contract clearly places the risk of uncertainty on one of the parties then that party must absorb the losses from unexpected conditions. The court found that following *Hollerbach* two conditions must be met to void an exculpatory clause. It must be unrealistic to expect the bidders to uncover error on their own and the misrepresentation must be material. According to the court, the state is not liable when it has done little more than represent the results of an investigation and the bidder knew or should have known of the factual basis of these representations. The government does not become an insurer merely by providing information to contractors.

The federal courts are not alone in holding that *Hollerbach* does not require governments to pay cost overruns when they provide data to a contractor. In *Branna Construction Corp. v.*

West Allegheny Joint School Authority, 430 Pa. 214, 242 A.2d 244 (S.C. of Pa., 1968), the prospective bidders were provided with test boring information. The contract stated:

> "No responsibility is assumed by the owner or architect for subsurface conditions, such information is given for guidance only. Bidders shall not rely on data, bidders shall make their own investigation."

The Pennsylvania Supreme Court recognized *Hollerbach* but held that the exculpatory clause was a sufficient manifestation of the intent of the government that the contractor should not rely upon subsurface conditions as represented by plans and specifications. In *accord, Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wash. 2d 214, 494 P.2d 399 (S.C. of Wash. 1971); *Wunderlich v. State*, 56 Cal. Rptr. 473, 423 P.2d 545 (S.C. of Cal., 1967); *Detroit and I. R. Co. v. Guthrie*, 72 F.2d 126 (6th Cir., 1934).

As stated previously, the courts are not in agreement on their interpretation and application of *Hollerbach*. In *Pitt Construction Co. v. City of Alliance*, 12 F.2d 28 (6th Cir., 1926), the contract contained an exculpatory clause to the effect that the bidders are required to examine the site and inform themselves of the magnitude of the work involved and the conditions and difficulties which would be encountered in performing the work. The depths of existing excavations shown on blueprints were stated as being "about." The Depths were inaccurate and the contractor brought suit for his cost overruns. The court held that the contractor was entitled to accept and rely upon the data provided by the city government, despite the exculpatory clause.

In *Transbay Construction Co. v. City and County of San Francisco*, 35 F. Supp. 433 (N.D. Cal., 1950), the bid invitation for a dam construction project stated that the quantities stated

in the contract were estimates only and the bidders were to make careful, personal examinations of the proposed work. Citing *Hollerbach* the court held that where the estimates proved incorrect the contractor could recover his cost overruns.

The Court of Special Appeals of Maryland is not the only state court which has followed this line of reasoning. In *Condun-Cunningham, Inc. v. Day*, 258 N.E.2d 264 (Ct. of Common Pleas of Ohio, Cuyahoga County, 1979) the county had made available to the bidders soil and foundation investigation reports. The reports stated that they were not part of the construction plans and were merely a source of supplementary information. The contract also stated that the bidder was required to examine the site and the contractor warranted that he had fully investigated the project and was aware of all the characteristics of the work. The court held that where the county makes tests results available to a bidder, the bidder is justified in relying upon the data and the county warrants that the information is accurate. In *accord, Alpert v. Commonwealth*, 258 N.E.2d 755 (Mass., 1970); *Penn Central Transportation Co. v. United States*, 366 F. Supp. 1161 (Del., 1973); *Gevyn Construction Corp. v. United States*, 357 F. Supp. 18 (S.D.N.Y., 1972).

In the sixty-six years since *Hollerbach*, the size and number of government construction contracts has increased tremendously, as has the involvement of the federal government in funding construction projects. The integrity of federal, state and municipal contracts is in jeopardy unless the Court makes a clear and definitive statement as to when a government will be held liable for information provided to contractors and when exculpatory clauses will be upheld. If contractors dealing with state and municipal governments have a free hand in claims for overruns, the taxpayers shall have to bear the brunt of the inevitable financial burden. If government cannot budget expenses for capital improvement projects and make

contracts accordingly, the fiscal affairs of our governments will become chaotic. *Raymond International, Inc. v. Baltimore County* presents the Court with a clear opportunity to make a definitive ruling in this confused and chaotic area.

The proceedings before the Trial Court involved five or six weeks of testimony and the consideration of numerous exhibits by the Trial Court. The hearing before the Court of Special Appeals of Maryland was intended to test the validity of various legal principles applied to the case at bar by the Trial Court. However, as indicated by the opinion of the Court of Special Appeals, the said Appellate Court made numerous findings of fact without having the benefit of hearing the testimony and examining the exhibits in the light of such testimony.

It is your Petitioner's belief that such a factual determination by said Appellate Court constitutes a violation of the due process rights of your Petitioner under the Fourteenth Amendment to the Constitution of the United States. The determination of said Appellate Court further excluded factual issues relating to proximate cause and the obligations of the Respondent, J. E. Greiner, Inc., to your Petitioner in accordance with contracts between said parties, which contracts were filed as evidence in the Trial Court. At the very least, your Petitioner believes and avers that the entire case should have been remanded to the Trial Court for further proceedings relating to liability and damages with the legal direction of the said Appellate Court relating to the legal principles to be applied by the Trial Court to the facts and evidence presented.

The failure on the part of the Special Court of Appeals to remand the entire case to the Trial Court constituted a final determination as to the issue of liability involving your Petitioner and Raymond International Builders, Inc., and involved a determination as to all issues between your Petitioner and J. E. Greiner, Inc., which your Petitioner believes to be an

erroneous conclusion in the light of the due process rights of your Petitioner and in the light of an appropriate application of the Supreme Court cases cited herein.

In addition to the substantial and important issues relating to *Hollerbach* and the Fourteenth Amendment to the Constitution of the United States, this Honorable Court should consider the defenses of sovereign immunity and the statute of limitations as presented by your Petitioner in the State Court. The Petitioner believes that the failure to apply such defenses by the State Court violated the rights of due process of your Petitioner.

Until July 1, 1976, when Article 25A, Section 1A of the Annotated Code of Maryland was changed, the county had the benefit of the defense of sovereign immunity in contract actions (Chapter 450 of the Laws of Maryland, 1976).

The claims of Raymond International in this proceeding originated prior to July 1, 1976, which made sovereign immunity applicable to the claims asserted against your Petitioner. When the Court of Special Appeals of Maryland remanded the proceeding to the Trial Court for damages, it failed to apply the defenses of sovereign immunity which were legally raised in the State Court.

With reference to the statute of limitations defenses, the testimony indicated that Raymond was fully aware of underwater conditions in September of 1972, but did not file any action until 1976 which was long after the three-year statute of limitations applicable had run. Petitioner believes and avers that the failure of the State Court to apply the defense of statute of limitations detrimentally affected the rights of due process of your Petitioner in the State Court proceeding.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND
No. 714
September Term, 1979

RAYMOND INTERNATIONAL, INC.

v.

BALTIMORE COUNTY, MARYLAND, et al.

Gilbert, C.J.
Thompson
Liss,
JJ.

Opinion by Liss, J.

Filed: April 11, 1980

This appeal by appellant, Raymond International, Inc., arises out of a judgment rendered in a non-jury trial in the Circuit Court for Baltimore County in which the presiding judge ruled that Baltimore County, one of the appellees, was indebted to the appellant in the amount of $18,431.98. At the same time, the trial judge entered a verdict for costs in favor of the remaining appellee, J. E. Greiner, Inc. Appellant filed the within appeal from these judgments.

By invitation to bid in May of 1972, Baltimore County solicited bids for underwater repairs to the bascule piers of the Wise Avenue Bridge over Bear Creek. Bidders were supplied with plans and specifications prepared for the County by Greiner. The proposed repairs consisted of the removal of deteriorated concrete from the bases of the piers and the placement of aggregate concrete in lieu of the deteriorated material. The bridge was originally built about thirty years ago. It was of the bascule type with two main piers which encompassed the channel of the river. The piers were of concrete resting on piles driven into the river bottom. Their reconstruction was contemplated to be accomplished by driving additional piles into the river bottom and encircling the piling with a cofferdam consisting of interlocking sheet piling driven into the bottom of the river and extending out of the water thus forming a boxlike structure. The cofferdam is erected and sealed in order to permit the water to be removed from the interior of the structure. The sealing of the cofferdam is accomplished by placing in its bottom a mass of concrete heavy enough to act as a plug and sufficient to counteract the pressure of the water. The placement of this mass of concrete is achieved by the "tremie" method which requires a tube to be lowered into the water through which concrete flows that settles on the bottom of the cofferdam. Subsequent to this operation, the water in the cofferdam is removed and work on the bridge pier may be completed free of the water. The mass of concrete in the bottom of the cofferdam is known as "tremie concrete," and

when construction or repair of the bridge pier is completed, the sheet piling of the cofferdam is removed and the "tremie" is abandoned by being left in place.

Over the years after the original construction of the bridge, Greiner conducted regular inspections of the bridge including the piers. In 1971, Greiner reported deterioration of the bridge piers below the waterline. This deterioration was determined to be of a progressive nature. Based on the data gathered including test borings and inspection by divers, Greiner came to the conclusion that the piers needed immediate repairs. Greiner communicated with Raymond which had some expertise in the making of underwater repairs. Raymond's representatives recommended a repair procedure which contemplated a jacketing of the piers with preplaced aggregate concrete. This procedure is a construction technique used in underwater work by which stones are placed in a form with a cementitious material (grout) pumped into the form displacing the water and forming concrete.

At the request of the County, Greiner prepared contract documents for the recommended repairs in order that the County could solicit bids. The documents included specifications, drawings, informational drawings, an addenda, an invitation to bid and other general provisions. Bids were solicited from a limited group of bidders who were thought to have the specialized abilities to perform the work. The group included Raymond which ultimately submitted a bid substantially below the bid of the next lowest bidder. Raymond and the County entered into an agreement by the terms of which Raymond was to finish the work in 100 days. Failure to do so made the contractor liable for liquidated damages under the contract. The County promised to obtain for Raymond a necessary right of way. Raymond was to be paid on a unit price basis the approximate sum of $213,000 based on the 230 cubic yard quantity estimated by Greiner and the County to be the amount

of aggregate concrete required to complete the job. The work to be performed consisted primarily of cleaning around Piers Nos. 3 and 4 of the bridge, forming and pouring preplaced aggregate concrete around the deteriorated faces of the piers, and making repairs to the submarine cables.

After the repairs began, Raymond contends it discovered that Greiner's specifications were inaccurate. It produced witnesses who stated that: (1) the material surrounding the piers was not soft as represented, but contained large pieces of concrete, pile butts, old timbers and steel; (2) the tremie was irregular with variations up to 1.5 feet; (3) no tremie existed in some areas; (4) only an average of two inches of deteriorated concrete could be chipped away, rather than the six inches represented in the plans and specifications which resulted in the projected total of 230 cubic yards of concrete not being able to be placed; and (5) the tremie was so weak in places that the form could not be anchored. Raymond contended below and contends here that as a result of the inaccuracy of Greiner's specifications it was required to perform unforeseeable increased work. Raymond also complained particularly that instead of the 230 cubic yards of aggregate concrete estimated to be used, it utilized and was paid for only 114 cubic yards. Raymond urges that its unit price as bid was computed by spreading its fixed costs over the 230 cubic yards stated in the plans and specifications and that the County paid for only 114 yards which deprived Raymond of more than half of its computed contract price. Raymond advised the County in a summary of claim filed on January 30, 1976, that while its original bid was $213,000, as a result of the misrepresentations included in the plans and specifications and the unforeseeable conditions arising out of the misrepresentations, its actual expenditure to complete the project amounted to $1,095,804.30. This calculation is apparently not disputed. Baltimore County rejected the claim and refused any adjustment in its contract with Raymond.

Suit was then filed by Raymond against Greiner and the County. The declaration was based on alleged fraud, negligent misrepresentation, breach of warranty and breach of contract. Raymond sought compensation for the additional costs incurred as a result of the unforeseen conditions of the piers, the return of liquidated damages retained by the County, and an award for punitive damages. During the course of the bench trial which lasted for many weeks, the trial judge granted Greiner's motion to dismiss at the conclusion of Raymond's case. At the conclusion of the entire case, the court awarded Raymond $900 representing rental payments made by the appellant for rights of way and $17,531 being the compensation withheld by the County which was due Raymond. The appellant, unsatisfied with the judgment of the trial judge, thereupon filed this appeal.

The issues to be decided are:

I. Whether the trial judge erred in holding that the plaintiff was not entitled to rely on the conditions, quantities and representations contained in the contract?

II. Whether the trial court erred in holding that the plaintiff was not entitled to compensation for the unforeseen or misrepresented conditions encountered in the performance of the contract?

III. Whether Greiner's motion to dismiss at the close of Greiner's case was improperly granted?

IV. Whether the County's motion raising preliminary objection was improperly granted on the issue of sovereign immunity?

V. Whether the trial judge erred in denying plaintiff's claim for an equitable adjustment in time and compensation due to a 50.1% underrun in preplaced aggregate?

I, II, V

One of the principal issues at trial was whether Raymond was justified in relying on the conditions, quantities and representations contained in the contract documents. Baltimore County in its defense relied principally on the contract documents which were filed as exhibits in this case. These documents included the invitation to bid, specifications, the proposal, the agreement, special provisions and various drawings. Included in the contract documents was the following which appeared in Section 5 of the special provisions:

> Original construction data has not been verified by actual field measurements and the conditions observed during the underwater inspections and tests may have changed since the date on which they were made. Therefore, the above described data are furnished to the Contractor for general informational purposes only and do not purport to represent existing field conditions. It shall be the Contractor's sole responsibility to verify by actual field measurements inspections and tests and data which may be of significance to him in the preparation of his bid.

The contract documents specifically stated that: "Special provisions shall govern over specifications, supplemental specifications and plans." The County points out that the invitation to bid at page 1-03 states: "Bidders must examine the drawings and specifications carefully and must make a personal examination of the location and nature of the proposed work."

In addition, the proposal which was made a part of the contract documents required the bidders to agree as follows:

> The undersigned hereby declare that they have carefully examined the Form of Contract, Specifications, Special Provisions and Drawings forming a part of the same and have to their satisfaction examined the locality of the proposed work and agreed to furnish all labor, tools, materials, machinery, equipment and other means of construction called for in the manner provided in the Contract, Specifications, Special Provisions and Drawings thereto and requirements under them of the Engineer. . . .

Sheet "X" which also was made a part of the contract documents provided:

> Note 2–contractor to verify all dimensions in field.
>
> Note 5–dimensions shown taken from as built plans and have not been verified by actual measurement. The contractor shall verify any and all dimensions as may be required to complete satisfactorily all work under this contract.

Relying on these provisions, the County urgently contends that the trial judge was correct when he held that there was no "justifiable reliance" by the appellant on the conditions stated to exist at the Wise Avenue bridge by the County's engineer, Greiner, and that the trial judge committed no error when he held that: "[T]he contract documents that finally formed the contract clearly placed the burden to the Plaintiff to make a reasonable inspection to determine if these conditions were as depicted as in the contract documents."

The legal issue boils down to a question of whether Raymond was required to verify independently the information upon which it based its bid, or whether Raymond was justified in relying on the information supplied by the County and its engineer as to the plans and specifications for the project.

The seminal case on the subject is *Hollerbach v. United States*, 233 U. S. 165, 34 S.Ct. 553, 58 L.Ed. 898, which was decided by the Supreme Court in 1914. That controversy involved a contract between the appellant Hollerbach and the United States Government for the repair of a dam. In its specifications for the contract, the Government stated that the dam was backed with broken stone and sediment. As the contractor proceeded with the work of removing the material, it was discovered that the backing of the dam was composed of a soft, slushy sediment and that the required excavation of the dam was substantially greater than that stated in the contract documents. The contract contained several exculpatory clauses which were stated as follows:

> It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.
>
> * * * * * * * * * * *
>
> It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the

> office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal. [233 U. S. at 167-68, 34 S.Ct. at 554.]

In spite of the Government's attempt to make the contractor responsible for his own inspection, the investigation of the site and the work to be done under the contract, the Supreme Court held:

> [T]he specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity. See *United States v. Stage Co.*, 199 U.S. 414, 424. [233 U.S. at 172, 34 S.Ct. at 556.][1]

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[1] *See also* United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); Christie v. United States, 237 U.S. 234, 35 S.Ct. 565, 59 L.Ed. 933 (1915).

Appellant also cites *Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957 (N.D. Ga. 1976). In that case, the results of test borings were gratuitously provided to bidders along with specifications and other contract documents. The contract contained a clause in which the owner disclaimed any responsibility for the accuracy of the test results or for any conclusions drawn from them. The contract specifically provided that the test boring data were not to be considered a part of the contract. The contractor sued for misrepresentation because it discovered the level of rock was substantially higher than had been represented by the test boring.

The District Court in *McKee, supra*, at 959, held that it is clear "the government does not become an insurer merely by providing certain information" to the contractor. That Court, in determining whether the Government was liable for misinformation which it furnished to the bidder, posed two questions which must be examined: (1) "whether the contractor could have discovered the true facts through *reasonable* investigation[?]" and: (2) what "is the materiality of [the] misrepresentation itself[?]" *Id.* at 960.

Condon-Cunningham v. Day, 22 Ohio Misc. 71, 258 N.E.2d 264 (1969) involved a suit in which damages were allowed to a highway contractor as a result of misleading soil tests even though the contract provided that the test results were not part of the contract and that the contractors were obliged to make their own inspection. In examining the issue whether the contractor could have discovered the true facts for itself, the Court said:

> What were the bidders to do? Was each bidder to run these tremendously expensive core boring tests not knowing whether or not he would get the contract? Under defendant's contention there would be practically no bidders. A bidder would be faced with this

> dilemma. Shall I bid on what is presented to be and run the risk of loss if the information is not correct or shall I run core boring tests at great expense, amounting to thousands of dollars, which expense I must bear on my own if I do not secure the contract? [258 N.E.2d at 274-75.]

See also Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co. v. United States, 551 F.2d 945 (5th Cir. 1977); *Foster Construction C. A. & Williams Bros. Co. v. United States*, 435 F.2d 837 (1970); *Alpert v. Commonwealth*, 357 Mass. 306, 258 N.E.2d 755 (1970).

There is one case from the Court of Appeals in which a similar controversy was addressed. That case is *Linz v. Schuck*, 106 Md. 220, 67 A. 286 (1907), in which a contractor was hired to excavate a cellar under appellant's property. Before submitting a price, the contractor inquired about the nature of the soil whereupon he was taken by the owner to a property across the street from the subject property and shown a cellar which the owner stated had been constructed without any difficulty. When the contractor began the work, however, it was ascertained that the building stood on a three-foot crust of hard ground under which were muddy, swamp-like conditions. It was conceded that the contractor could have ascertained the condition of the earth under the house by digging a test hole. However, the contractor relied on the owner's representations without performing any tests. Suit for additional compensation due to substantial and unforeseen difficulty was brought by the contractor. In affirming a judgment for the contractor, the Court of Appeals said:

> When two parties make a contract based on supposed facts which they afterwards ascertain to be incorrect; and which would not have been entered into by the one party if he had known the actual conditions

> which the contract required him to meet, not only Courts of justice but all right thinking people must believe that the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. [106 Md. at 230.]

We have very carefully reviewed the record extract in order to determine whether the trial court was clearly erroneous in its conclusions as to the law and the facts. The record extract establishes that the specifications as prepared by Greiner on behalf of Baltimore County were materially wrong and substantially inaccurate. The evidence disclosed no substantial dispute that the conditions as found by Greiner and reported to the County and to the bidders were substantially different from those encountered by Raymond when it began to perform the work required by the contract. Greiner and the County knew or should have known the representations regarding the deterioration of the piers and the quantities of concrete necessary for the repairs were inaccurate as Greiner had been engaged by the County over a period of years to inspect the underwater portions of the bascule piers. Greiner actually had thirteen contracts with the County between 1968 and 1972 which required Greiner to make underwater inspections of the bascule piers, tremies and piles, and field supervision of the piers.

Greiner, as agent for the County, submitted to Raymond information and plans which represented an average surface deterioration depth of six inches in spite of the fact that Greiner had reports from its divers that indicated the average depth of deterioration was only two inches. Therefore, in its bid proposal, Greiner required a computation based on quantities and information which Greiner knew or should have known was incorrect. To suggest that Raymond, who had been solicited to bid on the job by the County and Greiner, should have conducted diving tests in order to verify the information given it in the

plans and specifications prepared by Greiner seems to us to place an undue burden on Raymond. Entirely apart from the substantial cost of any such verification, it is obvious that Greiner required a period of almost four years and innumerable test divings to compile the information necessary to prepare the plans, specifications and bid proposals, and that even in view of that lengthy time frame the information it had was incorrect. We conclude that Raymond was not reasonably able to discover the true facts for itself and was, therefore, entitled to rely on the representations made by the County and Greiner.

As to the materiality of the representations, there can also be no dispute. Raymond established that its bid was conditioned upon the erroneous representation in the contract documents that a total of 230 cubic yards of aggregate concrete would be required to perform the contract. The actual amount required was approximately 114 cubic yards. The bid was based on a unit price per square yard, and because the County paid only for the actual amount used, the appellant was deprived of over half its contract price. In addition, because of the incorrect information supplied to Raymond, the contractor was required to perform additional work in connection with the use of the prefabricated forming system and to utilize new methods for sealing and anchoring the form bottoms. As a direct result of the variations from the conditions as represented in the plans and specifications, Raymond was unable to complete the project within the 100 days provided in the contract. As Raymond failed to perform within the time specified, the County withheld the sum of $37,000 notwithstanding that performance was impossible within the 100 days required by the contract.

Appellee Baltimore County relies on *Trionfo v. Board of Education of Harford County*, 41 Md. App. 103, 395 A.2d 1207 (1979), in which Judge Thompson of this Court exhaustively discussed the law of a contractor's right to recover on a

theory of misrepresentation. There we held, as we hold here, that the plaintiff must establish a right to rely on the misrepresentation. In *Trionfo*, we found no right to rely because the test boring data furnished to contract bidders were supplied only in exchange for a written release from the bidders designed to absolve the board from any responsibility for the accuracy or completeness of the information and to protect the board from assessments for additional work performed pursuant to assumptions made based on the supplied data. No such release provision exists in this contract. We, therefore, find *Trionfo* inapplicable to the present case. We conclude that the trial court erred in holding that the appellant was not entitled to rely on the conditions, quantities and representations contained in the contract. We further hold that the trial court erred in its finding that the appellant was not entitled to compensation for the unforeseen or negligently misrepresented conditions encountered in the performance of the contract.

We perceive an additional error in the trial court's rulings. The contract documents expressly incorporated the specifications of the State of Maryland with the contract between Raymond and the County. Section 10.09-3 of those specifications expressly provides for an equitable adjustment for major discrepancies in quantities as follows:

> Whenever a final quantity for any Major Contract Item shows that either the Proposal Quantity of said item, or the quantity specified therefor in any Supplemental Agreement has been actually overrun or underrun by more than 25 percent; the Contractor and Commission shall then be allowed an equitable adjustment in time and/or compensation as though said overrun or underrun had been anticipated by the Engineer and ordered, under the provisions of Section 10.04-3.

The term "major contract item" is defined in the State specifications as follows:

> Major Contract Items shall be the original Contract item of greatest cost, computed from the original Contract price and estimated quantity, or lump sum price and such other original Contract items next in sequence of lower cost, computed in like manner, necessary to show a total cost at original prices and quantities of not less than 60 per cent of the original Contract cost and all other Contract items shall be considered as minor items.

The record extract, we think, clearly establishes that the major contract items in this contract were the preplaced aggregate contract amount of $115,000 and the removal of the fender systems amounting to $34,000 and totaling more than 60 percent of the original contract price. The evidence is undisputed that the quantity of preplaced concrete used amounted to a 50 percent underrun of the prescribed quantities set forth in the contract. Under these circumstances, Raymond was entitled to an equitable adjustment in time or compensation. The trial court initially came to the same conclusion, but inexplicably without reliance on either the law or the facts changed that opinion and concluded that Baltimore County was entitled to a favorable verdict on the issues of the failure to renegotiate and on the issue of an equitable adjustment. The lower court said:

> The other three issues were the failure to renegotiate an equitable adjustment. At one point in the trial, I think I indicated to counsel, that I was really somewhat impressed that this is an issue that the plaintiff has a right to a particular equitable adjustment. I was very impressed by the testimony of Mr. Morris

> on this issue. He dwelled at length, but after reviewing the contract documents and listening to arguments of counsel, I've come to the conclusion that the defendant is correct that this is just not called for under the contract documents, and I could not, without breaking the rules of the law, allow that amount and I find that I would have to find for the defendant, Baltimore County, on those issues failing to renegotiate, and on the equitable adjustment.

We find nothing in the record extract on the basis of the facts or the law which supports that conclusion.

III

We find no error in the trial court's granting of Greiner's motion to dismiss Raymond's suit against Greiner on the grounds of misrepresentation at the conclusion of Raymond's case. Raymond contends that Greiner waived its right to file such a motion to dismiss because it offered testimony before the conclusion of the plaintiff's case and that this amounted to a clear violation of Maryland Rule 535. We do not agree. The record discloses that Greiner's counsel read into the record a short portion of the deposition of one of Greiner's executives, the major portion of which had been put into the record by Raymond's counsel. The clearly expressed purpose of the reading of the short excerpt of the deposition was for clarification of the witnesses' testimony. We do not find that this amounted to such a violation of either the letter or the spirit of Rule 535 as to make Greiner's motion to dismiss a "nugacity." *See Smith v. State Roads Comm.*, 240 Md. 525, 214 A.2d 792 (1965).

It would serve no useful purpose to again restate the five prerequisites of proof required to sustain an action for misrepresentation or deceit. It is sufficient to state that the appellant failed to produce evidence from which could be found or

inferred that Greiner intended to *defraud* by reason of the allegedly incorrect information it furnished to Raymond. Even assuming that Greiner was negligent in preparing the information it furnished to the bidders, that would not be sufficient to satisfy the plaintiff's burden as a misrepresentation induced by negligence or ignorance will not sustain an action for fraud. *Peurifoy v. Congressional Motors, Inc.*, 254 Md. 501, 255 A.2d 332 (1969). There was no testimony establishing clear and convincing evidence that Greiner's representations in this case were made for the specific purpose of defrauding the plaintiff. This is particularly so when we note that at the time the information was supplied to the prospective bidders no one had any knowledge as to who the successful bidder would be. It is not contended in appeal that the trial court was otherwise in error with respect to Greiner's motion.

IV

The trial court was correct in its ruling on the County's motion raising preliminary objection on the ground of sovereign immunity as to the first and second counts of Raymond's declaration which were founded on the torts of fraud and negligent misrepresentation. *See Jekofsky v. State Roads Comm.*, 264 Md. 471, 287 A.2d 40 (1972); *Godwin v. County Commissioners of St. Mary's County*, 256 Md. 326, 260 A.2d 295 (1970).

JUDGMENT REVERSED AS TO BALTIMORE COUNTY; REMANDED FOR NEW TRIAL AS TO DAMAGES ONLY. JUDGMENT AFFIRMED AS TO GREINER. COSTS TO BE PAID BY BALTIMORE COUNTY.

Supreme Court, U. S.
FILED
OCT 30 1980
MICHAEL RODAK, JR., CLERK

No. 80-512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALTIMORE COUNTY, MARYLAND,
Petitioner,

v.

RAYMOND INTERNATIONAL BUILDERS, INC.,
AND J.E. GREINER, INC.,
Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RAYMOND INTERNATIONAL BUILDERS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is any important federal question raised by the holding of the Court of Special Appeals of Maryland that under established principles of state law as applied to the facts, the trial court was clearly erroneous in refusing to allow Respondent, Raymond International Builders, Inc., to recover damages resulting from misleading and inaccurate information supplied by Petitioner in connection with a contract between Respondent and Petitioner.

2. Since the defenses of sovereign immunity and statute of limitations were neither raised nor preserved by the Petitioner in the Court of Special Appeals, should Petitioner be entitled by claiming lack of due process to have them reviewed by this Court?

3. Is the decision of the Court of Special Appeals a final judgment for the purposes of Title 28 U.S.C.A. § 1257 in light of the fact that the case was remanded for a determination of damages?

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Statutes

28 U.S.C.A. § 1257. State courts; appeal; certiorari:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed

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under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929 13

State Rules of Procedure

Rule 1086, Maryland Rules of Procedure:

When an action has been tried by the lower court without a jury, this Court will review the case upon both the law and the evidence, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses 10

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ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RAYMOND INTERNATIONAL BUILDERS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

By Invitation to Bid in May of 1972, Defendant, Baltimore County ("County") solicited bids for underwater

repairs to the bascule piers of a bridge in the County. Bidders were supplied with plans and specifications prepared for the County by J. E. Greiner Company, Inc. ("Greiner"). The proposed repairs consisted of the removal of deteriorated concrete from the bases of the piers and the placement of aggregate concrete in lieu of the deteriorated material.

The plans and specifications showed a strong, level tremie (the footing of the pier) requiring no substantial preparatory work prior to the placement of the forms for the concrete. The plans expressly specified that 230 cubic yards of preplaced aggregate were to be used. In addition, the specific quantity of 230 cubic yards was printed on the bid (proposal) form and, pursuant to the State's specifications, the Plaintiff, Raymond International Builders, Inc. (hereinafter referred to as "Respondent" or "Raymond") had no right or discretion to change it; consequently, Respondent's bid was calculated on a unit price basis, spreading its fixed costs over the entire 230 cubic yards.

On July 17, 1972, Respondent entered into a contract with the County to make the necessary underwater repairs to the bridge. By the terms of the agreement, Respondent was to finish the repairs within 100 working days; failure to do so would result in liquidated damages. In return, Respondent was to be paid, on a unit price per cubic yard basis, the approximate sum of $213,000 based on the 230 cubic yard quantity represented by Greiner and the County.

After the repairs began, Respondent discovered that the plans and specifications were materially wrong and were substantially inaccurate: (1) The material surrounding the piers was not soft as represented, but contained large pieces of concrete, pile butts, old timbers and steel; (2) the tremie was highly irregular with variations up to 1½ feet; (3) no tremie existed in some areas; (4) only an average of

two (2) inches of deteriorated concrete could be chipped away, rather than the six (6) inches represented in the plans and specifications, meaning that less than one-half the owner's represented 230 cubic yards of concrete could be placed; and (5) the tremie was so weak in places that the forms could not be anchored.

The necessary consequence flowing from such material inaccuracy was substantially unforeseeable increased work at an effectively reduced contract price because: (1) The prefabricated forming system had to be continually altered and new methods for sealing and anchoring the form bottom had to be implemented; (2) Greiner's specifications had incorrectly placed the location of the cable ramps and failed to show some ramps at all; and (3) significantly, the amount of estimated concrete deterioration was greatly overstated; instead of the 230 cubic yards of preplaced aggregate concrete called for in the Greiner specifications, Raymond utilized only 114.78 cubic yards. Raymond's unit price was computed by spreading its fixed costs of the 230 cubic yards represented in the plans and specifications. Because the County only paid for 114 cubic yards, Plaintiff was deprived of over half of its contract price as computed by spreading its cost of performance over the represented 230 cubic yards.

Greiner and the County knew or reasonably should have known that the representations regarding the deterioration of the piers and the quantities of concrete necessary for the repair were inaccurate. Greiner, an engineering firm specializing in the design and inspection of tidewater structures was engaged by the County over a period of years to inspect the underwater portions of the bascule piers, including the tremies. In fact, Greiner had a continuing relationship with the County consisting of thirteen (13) contracts between 1968 and 1972 requiring Greiner to make underwater inspections of the bascule piers, tremies and piles and for inspections and field

supervision of the repairs. Greiner had also designed and inspected the construction of the bridge. Pictures of the original construction and drawings attached to Greiner's May, 1971 report to the County show the cofferdam (a watertight compartment constructed to allow underwater construction) dewatered with the tremie exposed and able to be seen. Greiner reported the results of its inspection to the County.

At the time of the preparation of the plans and specifications for bidders, Greiner and the County had in their possession, but did not disclose to any bidders, a report made in 1971 which showed significantly less deterioration than that represented to Respondent. Greiner in the instant contract and pre-contract negotiations was the County's Agent and was so designated.

Greiner acknowledged privately as late as June 5, 1972, that "The chipping operations at both bascule piers had shown an average depth of deterioration of two (2) inches *rather than the anticipated six (6) inches outlined in the plans.*" (emphasis added). None of these discrepancies were ever communicated to the Respondent, however, nor was any of the underlying data supplied to even warn the bidders that the cubic yardage was misrepresented. As a result, the Respondent computed its price based on quantities and information which Greiner and the County knew to be false.

As a direct result of the variations from the conditions as represented in the Plans and Specifications, Respondent was unable to complete the project within the 100 days provided in the contract. In reliance on the liquidated damages provisions of the contract, the County withheld the sum of $17,531, notwithstanding the impossibility due to actual conditions of performance of the contract within 100 days.

As a consequence of the misrepresentations and unforseeable conditions, the performance of the work and completion of the project cost the Respondent $1,095,804.30 which actual expenditure was not disputed.

Suit was filed against both Greiner and the County on May 26, 1976 for the additional costs incurred, the return of the liquidated damages and an award of punitive damages. Plaintiff's causes of action included fraud, negligent misrepresentations, breach of warranty and breach of contract. In addition, Respondent sought an "equitable adjustment" of the contract pursuant to a provision of the contract permitting such adjustments where actual quantities deviated from bid quantities by 25% or more. Holding that the Respondent had no right to rely on the inaccurate and misleading materials supplied by Greiner and the County, the trial court entered a judgment for the Defendants on the issues of misrepresentation and recovery for unforseen conditions. In addition, the trial court refused Plaintiff's request that it apply the "equitable adjustment" provision of the contract.

On appeal the Court of Special Appeals of Maryland reversed, holding that, based on the record, the trial judge was clearly erroneous and Respondent was entitled to recover against the County for the unforseen and misrepresented conditions and further that the Respondent was entitled to an equitable adjustment of the contract. The Court of Special Appeals remanded the case to the trial court for a determination of damages. As of the date hereof, no hearing on damages has been had. The Court of Appeals denied, without written opinion, the County's Petition for Writ of Certiorari to the Court of Special Appeals.

SUMMARY OF ARGUMENT

1. The decision of the Court of Special Appeals of Maryland as it relates to Respondent, Raymond International Builders, Inc. ("Respondent") of which the County seeks review is essentially a two-part holding. First, under applicable state law, where a contracting authority provides material plans and specifications which the supplier thereof knows or reasonably should know are incorrect, and where the contractor is not reasonably able to discover the true facts for itself, the contractor is entitled to rely on the data provided notwithstanding general exculpatory provisions in the contract. Second, on the facts of this case, the contract provision requiring an "equitable adjustment" of the contract price where quantities deviated more than 25% was applicable. Neither of these holdings presents any important question of Federal law, nor is there any special or important reason for the Court to exercise its discretion to review this matter. The Court of Special Appeals applied established principles of state law and its decision does not abridge any federal or constitutional right of Petitioner.

2. Respondent's original suit against Petitioner was based on the following causes of action: fraud, negligent misrepresentation, breach of warranty and breach of contract. Petitioner raised various defenses including, *inter alia,* sovereign immunity to contract actions and the statute of limitations. Following the trial, the trial court held for Petitioner on the substantive issues but against Petitioner as the defenses of sovereign immunity in contract actions and the statute of limitations. Respondent appealed. Petitioner did not. The Maryland Court of Special Appeals reversed the trial court, finding its decision to be clearly erroneous as to the issues raised on appeal. It is respectfully suggested that this Court should not issue a writ of certiorari to the Court of Special Appeals of Maryland on the issues of sovereign immunity

and statute of limitations since these issues were neither presented to nor decided by that court.

3. The Maryland Court of Special Appeals found the decision of the trial court to be clearly erroneous and remanded the case for a determination of damages. The ruling of the Court of Special Appeals case does not raise any important federal question warranting review by the Supreme Court prior to a final resolution of all the issues by the highest court of this State in which review may be had.

ARGUMENT

I.

THE COURT OF SPECIAL APPEALS' HOLDING WITH RESPECT TO RESPONDENT'S RIGHT TO RELY ON MISLEADING AND INACCURATE PLANS AND SPECIFICATIONS WAS SOLELY AN APPLICATION OF SETTLED PRINCIPLES OF STATE LAW TO THE FACTS OF THIS CASE, AND PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

One of the primary issues on appeal to the Court of Special Appeals of Maryland (the "Appellate Court") was whether the County could avoid liability for the undisputedly inaccurate and misleading plans and specifications provided to Respondent in reliance on the exculpatory provisions of the contract. The trial judge had held that, in light of these provisions, the Respondent's reliance on the data was unjustified. The trial judge concluded that the contract documents required the Respondent to make an independent investigation of the data supplied to it. As stated by the Appellate Court:

> The legal issue boils down to a question of whether Raymond was required to verify independently the information upon which it based its bid, or whether Raymond was justified in relying on the information supplied by the County and its engineer as to the plans and specifications for the project. 45 Md. App. at 253-254.

The Petitioner urges that this issue should be reviewed by this Court because of alleged varying interpretations of *Hollerbach v. United States,* 233 U.S. 165 (1914). In that case a contractor was permitted to recover against the United States for inaccurate plans and specifications notwithstanding exculpatory language in the contract. Petitioner urges that this Court should review the instant case because courts in other jurisdictions have reached diverse results in subsequent litigation. In fact, however, *Hollerbach,* and each subsequent opinion of the Supreme Court which cites *Hollerbach,* involves a suit in which the United States was a party. *See, Christie v. United States,* 237 U.S. 242 (1914); *United States v. Spearin,* 248 U.S. 136 (1918); *United States v. Atlantic Dredging Co.,* 253 U.S. 11 (1919); *United States v. Smith,* 256 U.S. 17 (1920); *MacArthur Brothers Co. v. United States,* 258 U.S. 11 (1921); *Lynch v. United States,* 292 U.S. 579 (1933); *United States v. Blair,* 321 U.S. 738 (1943); *United States v. Standard Rice Co.,* 323 U.S. 111 (1944). *Hollerbach* is therefore binding on other courts only insofar as it relates to questions of federal law litigated therein. The instant case, as with most of the other decisions cited by Petitioner, involve questions of state law as applied to state contracts. It is not surprising that other jurisdictions have reached a variety of results applying the law of each such jurisdiction. Absent some important federal questions, it is not the function of the Supreme Court to interfere in the interpretation or administration of state law.

The Appellate Court clearly made its determination of this issue on the basis of state law. Citing *Hollerbach* for its obvious value by analogy, the Appellate Court analyzed numerous decisions from other jurisdictions before turning to a discussion of two controlling Maryland cases. The Appellate Court quoted the Court of Appeals of Maryland in *Linz v. Schuck,* 106 Md. 220, 67A. 286 (1907):

> When two parties make a contract based on supposed facts which they afterwards ascertain to be incorrect; and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only Courts of justice but all right thinking people must believe that the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. 45 Md. App. at 257.

In addition, the Appellate Court reviewed *Trionfo v. Board of Education of Harford County,* 41 Md. App. 103, 395 A.2d 1207 (1979):

> . . . in which Judge Thompson of this Court exhaustively discussed the law of a contractor's right to recover on a theory of misrepresentation. There we held, as we hold here, that the Plaintiff must establish a right to rely on the misrepresentation. In *Trionfo,* we found no right to rely because the test boring data furnished to contract bidders were supplied only in exchange for a written release from the bidders designed to absolve the board from any responsibility for the accuracy or completeness of the information and to protect the board from assessments for additional work performed pursuant to assumptions made based on the supplied data. No such release provision exists in this contract. We, therefore, find Trionfo inapplicable to the present case. 45 Md. App. at 259.

It is clear from the Appellate Court's opinion that its result was based on its review of the record and an application of principles of state law.

> We have very carefully reviewed the record extract in order to determine whether the trial court was clearly erroneous in its conclusions as to the law and the facts. The record extract establishes that the specifications as prepared by Greiner on behalf of Baltimore County were materially wrong and substantially inaccurate. The evidence disclosed no substantial dispute that the conditions as found by

> Greiner and reported to the County and to the bidders were substantially different from those encountered by Raymond when it began to perform the work required by the contract. Greiner and the County knew or should have known the representations regarding the deterioration of the piers and the quantities of concrete necessary for the repairs were inaccurate . . . Id. at 257-258.

Therefore, the Appellate Court held that the lower court had erred in holding that the Respondent was not entitled to rely on the information contained in the plans and specifications and that Respondent was entitled to compensation for the unforseen or negligently misrepresented conditions.

In addition to the contention that the Supreme Court should ennunciate uniform standards for interpretation of state contracts, Petitioner contends that certiorari should be granted because the Appellate Court allegedly made findings of fact which in some way were violative of Petitioner's due process rights. It has long been settled in Maryland that a decision of a trial court may be reversed if the trial court was clearly erroneous in its findings of fact. *See,* Rule 1086, Maryland Rules of Procedure, which provides as follows:

> When an action has been tried by the lower court without a jury, this Court will review the case upon both the law and the evidence, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses.

In reversing the trial court in the instant case, the Appellate Court, after briefs and argument, concluded that the lower court had been clearly erroneous in its holding; in no way is this result a denial of Petitioner's due process rights.

II.

THE COURT OF SPECIAL APPEALS' HOLDING THAT THE RESPONDENT WAS ENTITLED TO AN EQUITABLE ADJUSTMENT OF THE CONTRACT WAS A MATTER OF INTERPRETATION OF THE CONTRACT UNDER STATE LAW, AND PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

The contract between the County and the Respondent contained a provision permitting an equitable adjustment of the contract when any Major Contract Item, as defined in the specifications, is overrun or underrun by more than twenty-five percent. The Appellate Court reviewed the record and came to the conclusion that the Respondent should prevail.

> The record extract, we think, clearly establishes that the major contract items in this contract were the preplaced aggregate contract amount of $115,000 and the removal of the fender systems amounting to $34,000 and totaling more than 60 percent of the original contract price. The evidence is undisputed that the quantity of preplaced concrete used amounted to a 50 percent underrun of the prescribed quantities set forth in the contract. Under these circumstances, Raymond was entitled to an equitable adjustment in time or compensation. 45 Md. App. at 260.

The Appellate Court made the determination that the trial judge's contrary conclusion was utterly without basis in law or fact.

> The trial court initially came to the same conclusion, but inexplicably without reliance on either the law or the facts changed that opinion and concluded that Baltimore County was entitled to a favorable verdict on the issues of the failure to renegotiate and on the issue of an equitable adjustment. . . . We find nothing in the record extract on the basis of the facts or the law which supports that conclusion. *Id.* at 260-261.

This determination was clearly a matter of interpretation of the provisions of the contract in light of the uncontroverted facts disclosed by the record and application of principles of state law. Thus, no federal question is presented warranting review by this Court.

III.

THE ISSUES OF THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE STATUTE OF LIMITATIONS ARE NOT PROPER SUBJECTS FOR REVIEW BY THIS COURT SINCE NEITHER ISSUE WAS RAISED BY PETITIONER ON APPEAL.

Petitioner contends that it has been deprived of due process because in remanding the case for a determination of damages the Appellate Court failed to apply the defenses of sovereign immunity and statute of limitations.

The Declaration filed by the Respondent included both tort and contract causes of action against the County. Prior to trial, the lower court dismissed the Declaration as to the tort actions for intentional and negligent misrepresentations on the grounds that the County was immune from suit for its torts. The contractual causes of action seeking recovery for the damages resulting from the misleading plans and specifications and seeking an equitable adjustment of the contract were undisturbed.

Following the presentation of all evidence, the trial court's opinion expressly dealt with the defenses raised by the County of sovereign immunity for contract claims and the applicability of the statute of limitations:

> . . . I think the limitations probably even — I am trying to touch all bases, if I find there was liability on the part of the County and in the event the Appellate Court feels that I should rule on that issue for some reason, I'll rule on it now, I think the limitations would bar anything dating back three years, any builder, [sic] expense that was incurred prior to three years before the date of filing of the

> declaration in this case. I do find, I want to go into it, the issue of sovereign immunity. I find against the County. *Raymond International, Inc. v. Baltimore County, Maryland, and J.E. Greiner, Inc.*, Law Case No. 93617 (Circuit Court for Baltimore County, Maryland, 1979).

Respondent appealed from the rulings of the trial court that were unfavorable to it. Petitioner did not appeal from any of the rulings of the trial court. Thus the questions of the trial judge's rulings on the statute of limitations and sovereign immunity for contracts were never presented to the Appellate Court. While such defenses may have been raised at trial, it can hardly be said that the Appellate Court's decision violated Petitioner's rights since neither issue was raised on appeal.

IV.

THE CASE IS NOT RIPE FOR REVIEW BECAUSE THERE HAS BEEN NO FINAL JUDGMENT IN THE HIGHEST STATE COURT AS IS REQUIRED BY 28 U.S.C. 1257.

Title 28 U.S.C.A. § 1257 provides that "*final judgments* . . . rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court . . . (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution." (Emphasis supplied.) The Court of Special Appeals reversed the trial judge on the issue of liability, and remanded the case for a determination of damages. Petitioner argues that the final judgment rule is satisfied as to most, if not all of the issues in the case and therefore the case is ripe for review by this Court. Petitioner begrudgingly admits that the final judgment rule is not satisfied with respect to the issue of damages, but urges the Court to ignore that fact in deference to the fact that the highest state court in which a decision could be had has issued final rulings as to the more crucial issues. However, two of the three issues on which Petition-

er has based its final judgment argument, sovereign immunity and statute of limitations, are not properly before this Court at all because they were not raised below. *See* argument III, *supra*.

It is undeniably true that the Supreme Court has found the finality rule to be satisfied notwithstanding the fact that under certain circumstances an important federal issue may, upon remand, be mooted on non-federal grounds. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), *on remand,* 214 S.E.2d 530, 234 Ga. 67 (1975). And the Court generally will find the finality rule to have been satisfied where an important federal issue determinative of the outcome of the case has been decided and cannot be again raised for review; but that simply is not the case in this instance. Here, Petitioner is alleging a due process violation based on the Court of Special Appeals of Maryland's determination of its liability; but Petitioner's right to due process in this instance is inextricably related to the outcome of the case upon remand. If any federal questions are presented here at all, they certainly are not ripe for review apart from a final determination of Petitioner's actual liability in real (i.e. monetary) terms.

In *Republic Gas Co. v. Oklahoma,* 334 U.S. 62 (1948), Justice Frankfurter, writing for the Court, observed:

> . . . the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied-up for example, where liability has been determined and all that needs to be adjusted is the amount of damages. (Citations omitted) Id. at 68.

The foregoing observation describes precisely the procedural stage of the case at bar and provides strong precedent for denial on grounds of lack of finality of the Petition for Writ of Certiorari.

CONCLUSION

Respondent respectfully requests that a Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U. S.
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NO. 80-512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALTIMORE COUNTY, MARYLAND,
Petitioner,

v.

RAYMOND INTERNATIONAL BUILDERS, INC.
and
J. E. GREINER, INC.,
Respondents.

REPLY BRIEF OF PETITIONER IN RE: PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Baltimore County, Maryland, the Petitioner herein, heretofore filed a Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, and a Brief in opposition to such petition was heretofore filed by Raymond International Builders, Inc. The Petitioner believes that certain misleading and erroneous averments and arguments were made by such Respondent which need a reply. Therefore, the Petitioner is responding briefly herein pertaining to such averments and arguments.

Your Petitioner will deal with the questions actually presented by the said Raymond International Builders, Inc. (hereinafter referred to as Appellee) and will repeat such questions below for easy reference by this Honorable Court.

QUESTIONS PRESENTED

1. Is any important federal question raised by the holding of the Court of Special Appeals of Maryland that under established principles of state law as applied to the facts, the trial court was clearly erroneous in refusing to allow Respondent, Raymond International Builders, Inc., to recover damages resulting from misleading and inaccurate information supplied by Petitioner in connection with a contract between Respondent and Petitioner?

2. Since the defenses of sovereign immunity and statute of limitations were neither raised nor preserved by the Petitioner in the Court of Special Appeals, should Petitioner be entitled by claiming lack of due process to have them reviewed by this Court?

3. Is the decision of the Court of Special Appeals a final judgment for the purposes of Title 28 U.S.C.A. Section 1257 in light of the fact that the case was remanded for a determination of damages?

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REPLY BRIEF OF PETITIONER IN RE: PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

STATEMENT OF THE CASE

Your Petitioner will not repeat herein the facts alleged in the Statement of the Case heretofore set forth in the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland previously filed in this Honorable Court. However, the Petitioner will reflect upon what it believes to be misleading and erroneous statements in the Brief of the Appellee.

The Appellee has alleged that the plans and specifications referred to in this proceeding showed a strong, level tremie (the footing of the pier) requiring no substantial preparatory work prior to the placement of the forms for the concrete. However, this allegation by the Appellee is incorrect in view of the fact that the testimony before the Trial Court showed a complete conflict on the factual issue of the tremie as it existed on any plans and specifications. The Trial Court's conclusion did not reveal any finding of a strong, level tremie.

The Appellee further alleges that the plans expressly specify that two hundred and thirty yards of preplaced aggregate were to be used. However, the documents clearly indicated that the reference to two hundred and thirty cubic yards was an approximate reference and not absolute as alleged by the Appellee.

Additionally, the Appellee alleges in its Statement of the Case that after the repairs began, Respondent discovered that the plans and specifications were materially wrong and were substantially inaccurate. However, there was a complete conflict in the testimony before the Trial Court on this issue and the Trial Court did not find or determine that the plans and specifications were materially wrong or were substantially inaccurate.

The Appellee further alleges in its Statement of the Case that the underwater conditions were unforeseeable. However, the testimony was in complete conflict on this issue and the Trial Court did not find that such underwater conditions were unforeseeable. Also there was much testimony concerning the lack of skill and competence of the subcontractors of the Appellee which caused difficulties to the work being performed by the Appellee.

The Appellee further alleges that it only utilized 124.78 cubic yards, but the testimony did not reflect any such absolute figure concerning the aggregate concrete used by the Appellee.

Although the Appellee continues to allege that representations made to it were inaccurate, there was no such finding of fact before the Trial Court.

In essence, there was a long trial containing disputed facts and evidence which resulted in the Trial Court's decision in favor of the Petitioner herein. The determination of the Court of Special Appeals of Maryland seems to make a complete factual determination in the case without the benefit of listening to the witnesses and without the benefit of the direct contact with the case as was presented to the Trial Court.

REASONS FOR GRANTING THE WRIT

Your Petitioner will not repeat herein the reasons given in its Petition for Writ of Certiorari previously filed in this proceeding, but your Petitioner desires to reflect upon the argument made by the Appellee to its questions presented.

On page eight of the Brief of the Appellee, the Appellee argues that the Appellate Court clearly made its determination of the issues in the case based upon state law and not upon *Hollerbach v. United States*, 233 U.S. 165 (1914). However, on page eight of the opinion of the Court of Special Appeals, the drafter of said Opinion stated as follows:

> "The seminal case on the subject is *Hollerbach v. United States*, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898, which was decided by the Supreme Court in 1914."

Although the said Court of Special Appeals of Maryland did discuss other Maryland cases, these Maryland cases fell back upon *Hollerbach*. For example, the Court of Special Appeals referred to the case of *Trionfo v. Board of Education of Harford County*, 41 Md. App. 103, 395 A.2d 1207 (1979). In *Trionfo*, the Court of Special Appeals relied upon *Hollerbach*, but found no right to rely because the test borings furnished to

contract bidders were supplied only in exchange for a written release from the bidders which release was designed to absolve the board from any responsibility for the accuracy or completeness of the information and to protect the board from assessments for additional work performed pursuant to assumptions made from the supply data. In effect, the Court of Special Appeals was saying that the application of *Hollerbach* was absolute in that any data submitted could place the governmental agency fully responsible unless a release is actually executed relating to the data supply.

It is hard to believe that the state of the law relating to *Hollerbach* is that a municipal, or governmental agency, would have to obtain a specific release if it gave any information to a bidder even if (as in the case at bar) the information was over forty years old and clear warnings were given to the bidder that the information should not be used with reliance. Therefore, on the issue of whether or not an important federal question exists, we respectfully submit that there is a definite need for this Honorable Court to clarify the *Hollerbach* decision in view of the other Supreme Court decisions referred to in the original Petition filed herein, and in order to protect the municipal governments from the hard line taken by the Maryland Court of Special Appeals in the case at bar and in the *Trionfo* case where practically absolute liability exists for overruns. We believe that the Supreme Court never intended that *Hollerbach* would be applied to this extent.

In connection with the second question raised by the Appellee that the defenses of sovereign immunity and statute of limitations were neither raised nor preserved by the Petitioner in the Court of Special Appeals, your Petitioner will refer to specific sections in its Brief before the Court of Special Appeals which clearly indicate that such issues were presented in its Brief. Additionally, such issues were presented before the Trial Court and in oral argument before the Court of Special Appeals of Maryland.

On page eight of the Petitioner's Brief before the Court of Special Appeals, your Petitioner clearly discussed the defenses of sovereign immunity. In addition, on page nine of said Brief, your Petitioner discussed the application of the statute of limitations to the claims of the Appellee herein. The following is a quote from the aforesaid page eight of your Petitioner's aforesaid Brief:

> "Also, the theory of sovereign immunity applied to contracts until July 1, 1976 when Article 25A, Section 1A, abrogated a chartered county's use of the defense of sovereign immunity in contract actions (Chapter 450 of the Laws of Maryland, 1976).
>
> "The County further defended in the case at bar under the theory of sovereign immunity against the contract claims of the Appellant in view of the fact that such contract claims originated prior to July 1, 1976."

The following is a direct quote from page 9 of your Petitioner's Brief aforesaid:

> "Another technical defense raised by the County in this proceeding was the doctrine of the Statute of Limitations in view of the fact that the testimony clearly indicated that the Appellant knew about the underwater conditions in September of 1972, but did not file any action until 1976. The contract documents in question were not under seal, and any claims against the County should have measured from September of 1972 and would have expired three years thereafter."

Responding to the third question presented by the Appellee herein, your Petitioner alleges that the issues relating to the Appellee, Greiner Engineering Sciences, Inc. (which did not file any brief herein), and the issues relating to sovereign immunity

and the statute of limitations are completely final in nature. In addition, the seriousness of the application of the *Hollerbach* case, and the broad implications from such construction which shall affect municipal and state contracts throughout the country should require a review by this Honorable Court.

Many of the public works agreements executed by state and local governments involve federal funds so that there is broad national interest in the issues outlined herein. A clarification by this Honorable Court would go far in clearing up the question of the application of *Hollerbach* in state courts and would remove the great fear that now exists in supplying any information to bidders in public works contracts.

CONCLUSION

For all the reasons cited herein and in the Petition for Writ of Certiorari previously filed, we respectfully request that this Honorable Court grant the Writ of Certiorari requested.

Respectfully submitted,

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